

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
PETER W. MOSSEAU

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
ANNE R. CLARKE
MARC R. SCHEER
DONALD J. PERRAULT
MARTIN R. JENKINS
BETSY S. WESTGATE
EDWARD L. CROSS, JR.
PETER C. SCOTT
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER
PAUL BARBADORO
BRUCE E. MOHL

THE STATE OF NEW HAMPSHIRE



THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

83-147-I

ASSISTANT ATTORNEYS GENERAL
JOHN A. MALMBERG
DOUGLAS L. PATCH
LORETTA S. PLATT
ROBERT P. CHENEY, JR.
LESLIE J. LUDTKE
ANDREW L. ISAAC
RONALD F. RODGERS
G. DANA BISBEE
PETER T. FOLEY
STEVEN M. HOURAN
JEFFREY R. HOWARD
EVE H. OYER
GREGORY W. SWOPE

ATTORNEYS
DANIEL J. MULLEN
JAMES D. CAHILL, III
EDNA M. CONWAY
AMY L. IGNATIUS
T. DAVID FLOURDE

November 22, 1983

Mr. Delbert Downing
Chairman
Water Resources Board
37 Pleasant Street
Concord, New Hampshire 03301

RE: WATER WELL BOARD STATUTORY INTERPRETATION

Dear Mr. Downing:

By a memorandum dated October 28, 1983, you asked this Office for its opinion on a number of questions relative to RSA 489-B, which statute provides for the licensing and regulation of water well contractors and pump installers and which was passed into law by Ch. 359:1 of the Laws of 1983. The specific questions you asked are as follows:

1. Does RSA 489-B authorize the Water Well Board to issue licenses to individuals for the purpose of engaging in the business of constructing a water well or installing a well pump?
2. If the Board issues a license under RSA 489-B to a corporation, must all individuals employed by the corporation and directly engaged in the well and pump installation activities of the corporation be individually licensed under the statute before the corporation can engage in such activities.



3. RSA 489-B:5, IV provides that:

The board may issue an appropriate license without examination to a person to whom a water well contractor's license or a pump installer's license has been previously issued by another state if the other state maintained a standard of requirements equivalent to those of this state and who presents satisfactory proof to the board that he is a bona fide water well contractor or pump installer.

Under this statute, as of what date is the Board to evaluate the standards of a foreign state to determine if they are equivalent to New Hampshire's standards?

4. Chapter 359:3 of the Laws of 1983 provides that:

A person who has been actively engaged in the business of a water well contractor or a pump installer prior to the effective date of this act and who has been a resident of this state for at least one year immediately preceding the date of his application shall not be required to submit to an examination under RSA 489-B:5, III if he applies for a license before January 1, 1984. Such a person shall be issued a license upon completing an application and paying the initial fee; provided, however, that he must take and pass the examination and conform to other applicable rules adopted under RSA 489-B:4 by July 1, 1986 in order to be eligible for a license after that date.

Would a New Hampshire resident qualify for the examination exemption provided for above if he requested an application from the Board for a license prior to January 1, 1984 but does not actually fill out the official Board license form. (The Board asks this question because, due to administrative problems, it is unlikely that the Board will have official license application forms available until after January 1, 1984.)

5. RSA 489-B generally provides that after January 1, 1984 all applicants for a water well contractor's or pump installer's license must take and pass an examination prepared and administered by the Board. See, RSA 489-B:5, III and Ch. 359:3 of the Laws of 1983. If the Board is not able to offer a license examination to applicants until sometime after January 1, 1984, may applicants for licenses be issued an interim license until such time as an examination is available; if the answer to this question is "no," would the Board be liable to license applicants for damages resulting from their inability to engage in the well contracting and pump installing business until such time as an examination is available? (The Board asks this question because there is concern that the Board, which is presently in the process of developing a well contractor's and pump installer's examination, may not be able to complete this task until sometime after January 1, 1984.

A. Issuance of Licenses to Individuals

RSA 489-B:5, I requires any "person" who wishes to engage in the water well construction or pump installing business to first obtain a license from the Water Well Board for this purpose. RSA 489-B:2, VI defines the term "person" for purposes of the statute to include "an individual, partnership, corporation, association, or organization or any combination thereof." [Emphasis added.] The statute thus expressly provides that individuals are "persons" that may apply for and be issued RSA 489-B water well contractor and pump installer licenses under the provisions of RSA 489-B.

B. Corporate Licenses

RSA 489-B provides that water well contractor and pump installer licenses may be issued to corporations. The Board is of the view that:

... [I]f a license is issued to a corporation, the individuals employed by the corporation are not required to be licensed. However, because there is a requirement to demonstrate professional competency and pass an examination, one individual must be responsible for obtaining the license.

Mr. Downing
November 22, 1983
Page 4

This interpretation of RSA 489-B is correct. If the Legislature had intended to require all or certain key individuals employed by a corporation which applies for an RSA 489-B license to obtain individual licenses under this statute, it could have done so. A requirement of this type is found in RSA ch. 319-C which concerns the licensing of electricians and which provides that licenses under the statute may be issued to corporations provided "... one or more officers or employees of [the] corporation ... is a licensed master electrician." RSA 319-C:10 (Supp.) Reference is also made to RSA ch. 310-A (Supp.) which provides that corporations or partnerships may be licensed to engage in the practice of professional engineering provided inter alia that "All personnel of the corporation or partnership who act in its behalf as professional engineers are licensed under [the] chapter" RSA 310-A:12, I(b). We infer from the statutes relating to corporate licenses issued in the electrical and engineering fields that the Legislature's failure to include an individual licensing requirement in connection with water well and pump installer licenses issued to corporations under RSA 489-B was deliberate. Accordingly, it is our opinion that if the Board issues a license to a corporation under RSA 489-B, it is not necessary for the individuals who are employed by the corporation and who are directly engaged in water well and pump installation activities to be individually licensed under the statute.

As regards the Board's view that one member of a corporation must be responsible for obtaining the license because of the requirement to demonstrate competency and pass an examination, this is also a correct interpretation of the statute. Corporations can only act through their officers and agents. Marshall v. Herringer Ranches, Inc., 466 F.Supp. 285, 289 (Cal. 1979) Consequently, one member of a corporation applying for a license under RSA ch. 489-B will have to take such actions on the corporation's behalf as are necessary to make the corporation eligible for an RSA ch. 489-B license.

C. Applications for License from Residents of Foreign States

RSA 489-B:5, IV provides that:

The board may issue an appropriate license without examination to a person to whom a water well contractor's license or a pump installer's license has been previously issued by another state if the other state maintained a standard of requirements equivalent to those of this state and who presents satisfactory proof to the board that he is a bona fide water well contractor or pump installer.

The obvious purpose of RSA 489-B:5, IV is to exempt from RSA 489-B's license examination requirement only those non-resident well contractors or pump installers who practice their profession in a foreign state whose licensing requirements are as strict as New Hampshire's. Common sense tells us that the licensing requirements of RSA 489-B may change over time if the statute is amended or if the Board issues new rules relative to the qualification of license applicants. See, RSA 489-B:4, II. It follows that because the licensing requirements of the statute are subject to change over time, the date on which the licensing requirements of a foreign state should be examined to determine if a non-resident well contractor or pump installer qualifies for RSA 489-B:5, IV's examination exemption is the date on which the Board acts on the non-resident's request for exemption under the statute in question.

D. Exemption for Current Contractors and Installers

Chapter 359:3 of the Laws of 1983 provides that:

A person who has been actively engaged in the business of a water well contractor or a pump installer prior to the effective date of this act and who has been a resident of this state for at least one year immediately preceding the date of his application shall not be required to submit to an examination under RSA 489-B:5, III if he applies for a license before January 1, 1984. Such a person shall be issued a license upon completing an application and paying the initial fee; provided, however, that he must take and pass the examination and conform to other applicable rules adopted under RSA 489-B:4 by July 1, 1986 in order to be eligible for a license after that date.

Mr. Downing
November 22, 1983
Page 6

The apparent purpose of the above-quoted statute is to give current New Hampshire well contractors and pump installers a grace period of two years before they have to meet RSA 489-B:5, III's examination requirements. A current New Hampshire well contractor and pump installer can qualify for this grace period if he "applies" for a license prior to January 1, 1984. It is our opinion that this condition would be met by a person who requests the Board for a license prior to January 1, 1984 but who does not fill out an official license application form because there are no such forms available for distribution on this date. To hold otherwise would render meaningless and nullify Ch. 359:3's two-year exemption period for resident New Hampshire contractors and pump installers in light of the anticipated unavailability of official application forms up to January 1, 1984. Such a holding would be inconsistent with the rule that "It is not to be presumed that the Legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute." State v. Kay, 115 N.H. 696, 698 (1975).

E. RSA 489-B:5, III's Examination Requirement and Prospective Board Inability to Have Exam Available by January 1, 1984

RSA ch. 489-B generally provides that, after January 1, 1984, no person may be issued a license to construct water wells or install well pumps unless he first passes an examination prepared and administered by the Board. This requirement of the statute is clear and precise. It follows that in the event the Board does not develop a licensing exam by January 1, 1984, the Board may not issue water well contractor or pump installer licenses under RSA 489-B until this situation is corrected.

In this regard, we note that the Board indicates in its memorandum of October 1983 that it wishes to issue "interim licenses" until such time as it can develop and prepare the examination called for by RSA 489-B. The problem with this proposal is that the Board is nowhere given authority to issue "interim licenses" by RSA 489-B. Nor can the Board accomplish this result by its rulemaking authority because the Board's rulemaking authority does not include the power to "add to, change, or modify the statute." Reno v. Hopkinton, 115 N.H. 706, 707 (1975), citing State v. Normand, 76 N.H. 541, 545 (1913). Accordingly, the Board lacks the power to resolve the problem in question by the issuance of "interim licenses."

Mr. Downing
November 22, 1983
Page 7

On a related matter, we note that the Board is concerned that its prospective inability to issue licenses until such time as it prepares an examination will make it liable to suits for money damages filed by persons who are thus prevented from engaging in the well contracting and pump installing business. We do not believe this concern to be justified because in New Hampshire sovereign immunity is the law of the land. Sousa v. State, 115 N.H. 340 (1975). State agencies are subject to suit in New Hampshire for money damages only in situations where they have entered into a contract and breached same. The situation with which the Board is concerned is not a breach of contract situation and, thus, the doctrine of sovereign immunity applies.

We trust that this letter answers all of the questions you raised in your memorandum of October 28, 1983. Please feel free to call this Office if you have any further questions regarding this matter.

Very truly yours,

Edward L. Cross, Jr.

Edward L. Cross, Jr.
Assistant Attorney General
Environmental Protection Division

ELC, JR./tlr
83-147-I